Premium Foods, Inc. *and* United Food and Commercial Workers Local Union No. 1439, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Cases 19-CA-12796 and 19-CA-12829

March 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 29, 1981, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Premium Foods, Inc., Spokane, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[3]

[1] We note that although the Administrative Law Judge stated, in sec. III,B,1, of his Decision that the business of Swift Fresh Meat Company was "primarily oriented to the retail trade, with a secondary emphasis on food service," he correctly stated later in the same section that retail sales constituted 40 percent of Swift's volume and food service sales constituted 60 percent until the last 2 months of Swift's operation when the percentages of retail and food service sales were equal.

Member Hunter finds it unnecessary to pass upon the Administrative Law Judge's characterization of the Union's letter of August 26, 1980, as a continuing bargaining demand.

[2] In adopting the Administrative Law Judge's conclusion that Respondent is a successor employer to Swift, we do not rely upon his finding that Respondent purchased Swift's existing inventory. Furthermore, in adopting his conclusion that former production employees of Swift constituted a majority of Respondent's work force at the time the Union requested bargaining on August 26, we rely upon his finding that the operating unit was then comprised of eight rank-and-file employees, excluding Jerry Anderson, a low-level supervisor.

[3] We have substituted a new notice which conforms to the recommended Order of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act, as amended, gives all employees the following rights.

To organize themselves
To form, join, or support unions
To bargain as a group through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT refuse to recognize and bargain collectively with United Food & Commercial Workers Local Union No. 1439, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the collective-bargaining representative of:

All production and maintenance employees, including truckdrivers at our Spokane, Washington, plant, excluding manager, salesmen, clerical employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act, as amended.

WE WILL, upon request, bargain collectively with the above-named labor organization as the collective-bargaining representative of the employees in the unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

PREMIUM FOODS, INC.

DECISION

STATEMENT OF THE CASE

JAMES T. BARKER, Administrative Law Judge: This case was heard before me at Spokane, Washington, on

June 16 and 17, 1981, pursuant to an order consolidating case, consolidated complaint and notice of hearing issued on November 6, 1980, by the Regional Director of the National Labor Relations Board for Region 19.[1] The charges giving rise to the instant cases were timely filed in relation to the allegations of the complaint by United Food and Commercial Workers Local Union No. 1439, affiliated with United Food and Commercial Workers International Union, AFL-CIO, herein called the Union. The parties were represented by counsel at the hearing and were provided full opportunity to make opening and closing statements, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs with me. Counsel for the General Counsel and counsel for Respondent filed briefs with me.

Upon the basis of the entire record, the briefs filed in this matter, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times Respondent has been a corporation duly organized under the laws of the State of Washington, with a plant at its principal place of business located in Spokane, Washington, where it is engaged in the business of purveying meat and meat products.

In the course and conduct of its business operations during the 12-month period immediately preceding the issuance of the complaint herein, Respondent had gross sales of goods and services valued in excess of $500,000. During the same period of time Respondent purchased and caused to be transferred and delivered to its Spokane, Washington, facility goods and materials valued in excess of $50,000 directly from sources outside the State of Washington, or from suppliers within said State which, in turn, obtained such goods and materials directly from sources outside the State of Washington.

Upon the foregoing facts, which are not in dispute, I find that at all times material herein Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent concedes, and I find, that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are (1) whether Respondent is a legal successor to Swift Fresh Meat Company; (2) whether Respondent unlawfully denied employment to Leslie Reetz and Jacob Hendrix on or after August 24 when it commenced its business operations; and (3) whether Respondent unlawfully failed and refused to bargain collectively with the Union on and after August 26. Subsumed, and evolving from a determination of the successorship issue, is the further question of whether Respondent was free on August 4 and thereafter to fix initial terms and conditions of employment without consulting with the Union.[2]

Respondent denies the commission of any unfair labor practices and asserts, affirmatively, that it was not the legal successor to Swift Fresh Meat Company in that it purchased nothing from Swift and embarked upon an enterprise different in character, scope, and ownership from Swift, and was thereby free to select its employee complement and establish initial terms of employment on the basis of objective criteria and considerations without the necessity of bargaining collectively without consulting the Union. In any event, asserts Respondent, no bargaining obligation ever arose, even assuming it is found to be a successor to Swift, because on August 26, and thereafter, it possessed a reasonably based good-faith doubt as to the Union's majority status. Moreover, Respondent contends, in substance, that for legitimate, objective reasons not grounded in their involvement in the Union's activities, or affinity to the Union, Reetz and Hendrix were not offered employment with the new enterprise.

B. *Pertinent Facts*

1. Background Facts

At relevant times immediately prior to August 1, Swift was engaged at its Spokane facility engaged in the business of purveying meat and meat products, cheese, fish, shortening, and oils to approximately 230 hotel, restaurant, and retail customers located in the western portion of the State of Washington, eastern Montana and the northwest portion of the State of Idaho. Meat products comprised approximately 90 percent of Swift's total business which was primarily oriented to the retail trade, with a secondary emphasis on food service.

Swift is a large multi-national corporation with numerous facilities throughout the United States and in other countries. At the time of the closure of the Spokane facility on August 1, Robert Racicot was serving as Swift's sales unit manager in Spokane. He had served in that capacity since 1978 at which time he had been promoted from his previous position of plant superintendent of the Spokane operation. Prior to becoming plant superintendent in 1974, Racicot, who had entered Swift's employ 10 years earlier, had served in positions of increasing responsibility including, cleanup boy, truckdriver, order packer, and butcher. Racicot had been a union member from 1964 to 1974 and had taken a withdrawal card from the Union when he became superintendent in 1974.

At relevant times prior to the closure of the Spokane facility, Swift had been a party to a collective-bargaining agreement with the Union and the Union had been recognized as the exclusive bargaining representative of Swift's employees employed in the following described appropriate collective-bargaining unit:

[1] Unless otherwise specified, all dates herein refer to the calendar year 1980.

[2] The complaint alleges no unilateral changes, and the duty to bargain over initial terms and conditions arose, if at all, as a matter of law under the "perfectly clear" exception defined in *N.L.R.B. v. William J. Burns International Detective Agency, Inc.*, 406 U.S. 272 (1972).

> All production and maintenance employees, including truckdrivers at the [Spokane] plant, excluding manager, salesmen, clerical employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act.

By its terms, the agreement was to be effective through October 31, 1982. The agreement contained no union-security clause but prior to August 1 Swift was deducing dues from the paychecks of all of the employees in the unit and forwarding the proceeds to the Union. During normal operating times, approximately 12 or 13 employees comprised the unit. On the closure date nine employees were employed in five separate job classifications covered by the collective-bargaining agreement. These classifications included butcher, truckdriver, order packer, and utility and machine operator. Leslie Reetz was employed as an order packer when Swift terminated its Spokane operation and Jacob Hendrix was employed as truckdriver. They, like the other employees in the unit, worked under the general supervision of Wilfred Leslie, plant superintendent.

Swift is headquartered in Chicago and at relevant times operated a fresh meats division and a food service division. The Spokane operation was a fresh meats unit and typically 40 percent of its volume had been in the area of retail sales and 60 percent in the foods service area. Several months prior to closure, Swift lost a large account which delivered food to schools in Spokane. Thereafter, policy emanating from Chicago headquarters dictated that emphasis be placed upon retail sales and in the last 2 months prior to the cessation of operations at the Spokane facility the retail phase of the operation had reached approximately 50 percent of total volume. From its headquarters in Chicago Swift determined the territory operation of the Spokane unit, as well as the type of customers, product purchases, product mix, equipment acquisition, and administration of company policy. Ultimate decisions in personnel matters was dictated from the Chicago headquarters. The loss of the catering account resulted in a reduction in force of approximately four employees.

From the insight gained from his position as sales unit manager of Swift's Spokane facility, Racicot formed the impression in February or March that eventually the Spokane operation would close. Based on this belief he formulated in his own mind the elements of a plan to enter into his own business should the closure occur. On June 23, he had a chance meeting with James Millsap, a field representative of the Union. Millsap was on Swift premises during the lunch hour to obtain the signature of Raymond Hansen on a union membership card. In substance, Racicot told Millsap that Hansen's signature would be futile because Swift was going to close and he, Racicot, was going to operate the plant on a nonunion basis. Then, on or about June 27, Racicot was called to Chicago and informed that the Spokane unit and 51 other sales units of Swift would close. Racicot was presented with a letter relevant to the closing and was instructed to read the letter verbatim to all of the Spokane employees, and to limit discussion of the closing to the content of the letter. A meeting of employees was held on June 30 at which time Racicot read the letter to the employees as instructed. The employees were thus informed that the plant would close effective August 1. After reading the letter verbatim, Racicot stated he was going to attempt to organize a new operation but was not certain of success at that point.[3] Between June 30 and the scheduled closing date Racicot undertook diligent efforts to organize a new enterprise and to obtain financial and customer commitments sufficient to justify the planned venture. Financial commitments remained tenuous until August 1. However, as a prelude to obtaining financial backing, a new corporation was formed with Racicot as its president, Tom Purkett as vice president, and Roger Purkett as secretary. The Purketts were owners of Becwar Packing Company, a Spokane meat company which had served as one of the suppliers for Swift. Moreover, a letter over Racicot's signature stating his intention to continue in business as a new entity, and soliciting continuation of patronage was dispatched to all of Swift's customers as an attachment to invoices.

In formulating his plans for the new operation, Racicot determined that the business would be foods service oriented and would feature new concepts in packaged meat which would be promoted by advertising and placed in retail outlets. He projected goods sales volume and a significant increase in the employee complement to a level of 18 to 20 employees within 2 years as a direct result of this marketing approach. He concluded also that he could not sustain a profitable operation with a complement of nine employees.

As a corollary to launching the new enterprise, Racicot formulated a personnel policy predicated upon the need for a nucleus group of employees who could work harmoniously together as a team. By reason of his involvement with the Swift operation in Spokane, Racicot had had the opportunity to observe the work of the various rank-and-file employees and to evaluate their efficiency and attitudes. As the August 1 closure deadline approached, and as the formulation of the new enterprise came into clearer focus, Racicot reached the decision to hire all of the Swift employees except Leslie Reetz, Jacob Hendrix, and Jerry Denny. Racicot excluded both Reetz and Hendrix because he did not believe they would work in a friendly, cooperative, and harmonious relationship with him or the other individuals whom he intended to employ. Further, Racicot did not like either Reetz or Hendrix and he believed that they felt similarly toward him. Racicot planned not to employ Denny because his anticipated, initial personnel demands did not justify an additional truckdriver.

During the month of July Racicot spoke with the remaining employees of Swift, except Reetz and Hendrix, and communicated his hope to organize and operate his own facility. He tentatively probed the interest of those employees in working for him and told them he would pay the union wage scale other purveyors were paying

[3] I do not credit the testimony of Leslie Reetz and Jacob Hendrix to the effect that during the meeting Racicot said he intended to operate the business as his venture without interruption and without the Union. Racicot's testimony is to the contrary and no other testimony lends support to that of Reetz and Hendrix.

at the time. As the month of July drew to a close, Racicot spoke with representatives of two other unionized meats supply firms seeking to learn the wage scale under which they were operating. He obtained copies of the collective-bargaining agreements. Then, between August 1 and 4 Racicot extended to and received commitments from six employees of Swift to work for him in his new enterprise. Raymond Hansen asked the specific rate at which he would be paid and Racicot quoted a rate 94 cents below the rate he was receiving from Swift. On the last day or so of Swift's operation, Meinzinger discussed his pay with Racicot. Then on August 4, during the first day of operations he informed five of the six, including Hansen, that he would compensate them at wage levels equivalent or above those in effect in the area under two union contracts. Through inadvertence he failed to inform Bill Dormady of the wage level at which he would be employed, and Dormady first learned his pay scale when he received his first paycheck. Racicot did not specifically address the question of benefits in his conversations with employees prior to the commencement of operations, although he told Schieche that he would "go along with most of the [existing] benefits" and "add to them" if the new business was successful.[4]

2. The alleged proscribed conduct

a. *The successorship issue*

On August 4 Respondent commenced operations under the corporate name Premium Foods, Inc. It used the same building as Swift had utilized, retained the same telephone number, and, on a rental basis used meat cutting machines, freezers, and other in-plant machinery as Swift had used. On one or two occasions trucks which had been used by Swift were used in the operation of the new entity but new trucks were purchased to replace those used by Swift. While Respondent purchased the existing inventory of Swift, it purchased nothing else from Swift. When it ceased operations on August 1, Swift was serving approximately 230 customers, approximately 122 of which gave Respondent its patronage from the beginning of Respondent's operation on August 4. Respondent discontinued operations in the State of Montana save for a bid customer in the Glacier Park area of Montana, but otherwise served the geographic area encompassed by the Swift operation. Becwar Meats, which had been a supplier to Swift, was used by Respondent as a supplier, but under Racicot's operation of Respondent, purchases are made from a wide variety of suppliers with a "best buy" criterion serving as the yardstick. Respondent sells products to Becwar. Swift did not.

Respondent commenced operations on August 4 under the conceptual expectation of Racicot that the food service and not the retail phase of the operation would be the emphasis. He planned to market a variety of packaged food service items through retail outlets and advanced this marketing concept in seeking and obtaining financing for his new venture.

As found, Respondent began on August 4 with six operating employees, including Jerry Anderson, Bill Dormady, Raymond Hansen, Dean Meinzinger, George Schieche, and Ocee White. Each was employed in a job classification which had been represented in the Swift operating unit. Anderson had been employed by Swift as a butcher and gang leader. Anderson served Respondent in the same capacity of butcher and gang leader. Each of the other five employees had been employed by Swift prior to August 4.[5]

Racicot had projected that to sustain a profitable operation 18 to 20 employees would be required. However, at relevant times, Respondent's employee complement has not reached that number. On August 26 when, as found below, the Union made its bargaining demand upon Respondent nine individuals comprised the operating unit, as follows:

Jerry Anderson	Butcher and gang leader
Jerry Denny	Driver
Richard Deitzel	Utility
Raymond Hansen	Order packer/truckdriver
Dean Meinzinger	Driver
George Schieche	Butcher
Larry Schmidt	Cutting room/patty machine operator
Cecil Stanley	Cleanup
Ocee White	Butcher

Anderson, Denny, Hansen, Meinzinger, Schieche, and White had been employed by Swift at the time of the plant closure. The other individuals had not previously been in Swift's employment. By January 1981 Respondent had introduced and was successfully marketing through retail outlets a 5-pound box of ground beef patties, a food service item which had been promoted through television advertising. During January Respondent employed one full-time and two part-time employees who had not previously been in the employ of Swift in the bargaining unit represented by the Union. Subsequently in April 1981 the employee complement, including Anderson, was comprised of 12 individuals, 6 of whom had previously been employed by Swift. By June 1981 Respondent was selling to approximately 230 customers with approximately 98 percent of the volume centered in the food service industry catering to hotels and restaurants.[6]

b. *The bargaining demand*

On July 3 Ellis Katz, grievance administrator of the Union, dispatched a letter to Robert Racicot in his capacity as manager of Swift, requesting information concerning the impending closure of the Swift facility on

[4] The foregoing findings are based upon credited testimony which is not in dispute.

[5] I find that in the employ of Respondent Anderson is a low-level supervisor, for the credited testimony of Robert Racicot establishes that he had the authority and responsibility for scheduling work relating to the grinding operation in the cutting room, for directing the work of subordinate employees, and for taking disciplinary action in the absence of Racicot or the plant superintendent. Moreover, his recommendations with respect to personnel actions would be considered and followed by Racicot.

[6] All of the foregoing is based upon credited testimony of record which is not in dispute.

August 1, including the name and address of the new owners and an opportunity to discuss with management the impact of the closure and sale upon the "present bargaining unit." No response was received and on July 21 Katz sent a letter to Wilfred Leslie in his capacity as superintendent of Swift, calling Leslie's attention to the July 3 communication to Racicot and seeking a response to the request for information and bargaining contained in that communication. Subsequently, on August 26, Katz dispatched a letter to Roger Puckett, in his capacity as manager of Becwar Packing Company. The content of the letter was as follows:

> It is the Union's understanding that Becwar Packing Company has purchased the old Swift Plant. It is the Union's position that Becwar is a successor employer as that term is defined by the National Labor Relations Board. As such you are required to recognize and bargain with the union chosen by employees of the old Swift Plant. In view of the above, UFCW Local 1439 hereby notifies Becwar that it represents those employees of the old Swift Plant and that we request a meeting at the earliest opportunity to discuss your obligations under the labor agreement which was in effect with those employees. I will await your suggestions as to a date and time to meet.

Puckett responded to Katz by letter of September 10 wherein he stated that Becwar did not own the business "operating at the old Swift plant" and asserting that the "new company is now a successor employer which has any obligation to bargain." Puckett further answered, in substance, that action taken by the "majority of the employees" formerly employed by Swift in signing and mailing withdrawal cards had led management of the new operation to believe that the Union no longer represented a majority of the employees, and that a reasonable doubt had been created by said action. Puckett further asserted in his letter that the bargaining request of the Union was premature in that the "new operation has not yet completed its planned program of hiring its full complement of employees to staff and maintain the new business." In due course, on September 18, Katz dispatched the following letter, addressed to Premium Foods, Inc.:

> This letter is to reiterate a request sent to Roger Puckett of Becwar Packing Company. It is the Union's position that Premium Foods is a successor employer as that term is defined by the National Labor Relations Act. As such you are required to recognize and bargain with the Union chosen by the employees of the plant.
>
> In view of the above, UFCW Local 1439 hereby notified Premium Foods that it represents those employees of the old Swift plant and that we request a meeting at the earliest opportunity to discuss your obligations under the labor agreement which was in effect with those employees.
>
> I would request that you respond within seven days from the date of this letter.

Puckett replied by letter of September 22 wherein he referred Katz' attention to his previous letter of September 18, which Puckett characterized as a reply to Katz' most recent communication.

No collective bargaining between Respondent and the Union has taken place.

c. *The failure to hire Reetz and Hendrix*

Prefactory Facts

Leslie Reetz was initially employed by Swift in 1970 and during the 10 years of his employment worked as a cleanup man, utility helper, truckdriver, patty machine operator, and order packer. At the time of the plant closure, Reetz was serving as an order packer. Reetz was a member of the Union and from 1974 until the plant closed, he was a shop steward in the plant. Additionally, in 1978 he served as a vice president of the local and participated as a member of the bargaining committee in negotiations which transpired in 1976 and in 1979. During his term as shop steward, he processed approximately six or seven grievances, one of which was with Racicot in his capacity as unit manager of the Swift plant. One of the grievances filed by Reetz was a grievance concerning seniority for truckdrivers and was filed on behalf of Jacob Hendrix. In substance, the grievance pertained to an asserted contractual right to bid for routes and starting times on the basis of seniority. It alleged a unilateral modification of collective-bargaining terms resulting from an assignment made by Wilfred Leslie, the plant superintendent. As a result of a first-step grievance meeting between Reetz and Leslie, and a second-step grievance meeting between Reetz, Union Representative Jim Millsap, and Leslie, the grievance was formalized by a written submission. The matter was taken under advisement and Leslie denied the grievance.[7]

Jacob Hendrix entered the employment of Swift in 1974 and served as a utility cleanup man for the year and became a truckdriver in 1975, in which capacity he was employed when the plant closed. Hendrix was a member of the Union.

In May, a few weeks after Reetz had filed the grievance on behalf of Hendrix, Racicot learned of the grievance and called Hendrix by telephone in Glacier Park, Montana, where Hendrix was working. In speaking with Hendrix, Racicot asked Hendrix to describe the nature of the grievance. Upon receiving Hendrix's explanation, Racicot asked him why he had filed it. Hendrix gave his reasons. Racicot responded, "You know, Jake, I pulled your ass out of the fire about three times and now I'm fighting like hell to [to] try keep this going and I sure don't need any problems now." The conversation ended on this note.[8]

[7] The credited testimony of Leslie Reetz and documentary evidence of record supports the above findings.

[8] The foregoing finding is based upon the testimony of Robert Racicot, which I credit. I have considered the testimony of Jacob Hendrix and credit it only to the extent it is consistent with the above findings. I do not credit Hendrix's testimony to the effect that Racicot asserted he would get rid of Hendrix without regard to the cost to him or the Com-

Continued

On many occasions during the course of his employment Hendrix lodged complaints with Leslie concerning the condition of tires and brakes on the trucks assigned to him. Moreover, Hendrix lodged a complaint with Richard Blomberg, Leslie's predecessor as superintendent of Swift, complaining that Jerry Denny, another truckdriver, was claiming and receiving overtime compensation for completing delivery routes which he, Hendrix, routinely completed in less time. Hendrix complained, in effect, that this unfairly rewarded Denny and penalized him. This transpired in January and Blomberg spoke with Denny who stated that he was making his best effort and was expending full time in trying to complete his route in a timely fashion. He expressed the belief that he was being misrouted by Reetz and Hendrix who were responsible for loading the truck used by Denny. Denny informed Blomberg that this was a continuing problem. Blomberg consulted with Racicot and a procedure was developed which would permit the driver who was to make the run specify the order in which he wished the merchandise be placed in the delivery truck. Hendrix denies having received any complaints or comments concerning the manner in which the trucks were loaded.[9]

Racicot made no offer of employment to Reetz or to Hendrix. Neither Reetz nor Hendrix was employed by Respondent when it commenced operations on August 4, and they were not subsequently offered employment. Both filed employment applications with Respondent in October pursuant to the advice of a Board field examiner.

Racicot defined his reasons for not hiring Reetz and Hendrix as follows:

> Very basically, I didn't want them. When I picked this thing—when I put this thing together, I put it together as the people that I thought could work the best together as a team to do what I needed them to do and do what was needed to be done to make Premium Foods go as—over the years, there had been a lot of little things that had happened between Jake Hendrix, Les Reetz and myself.

Racicot testified that he considered Reetz and Hendrix to be "insubordinate" and "troublemakers." Racicot added:

> I didn't employ them because they were not team players as far as I was concerned on what they—on what I wanted done, I knew there was a personality conflict, they did not like me and I sure didn't like them.

He testified also that in addition to being troublemakers and insubordinate, Reetz and Hendrix "picked on anything they could about working conditions or what they had to do." Prior to August 4 Reetz and Hendrix had told Wilfred Leslie that they would not work for Racicot at the wages he was offering, and during the last week of July Reetz told Jerry Anderson that he would not work for Racicot at the wages he was going to pay.[10] These comments were reported to Racicot by Leslie and Anderson. Moreover, from his own involvement with Reetz and Hendrix, and from reports received from Wilfred Leslie, Racicot was aware prior to August 4 that both Reetz and Hendrix continually complained about a wide variety of matters, including working conditions, with an indirect bearing upon the collective-bargaining contract. Racicot credibly testified:

> They bitched about working conditions, they—it wasn't just the contract; you keep bringing that up, but that's not the point at all and that's not what I had in the back of my mind when I put this thing together. They did not get along well with their fellow employees.

Racicot added:

> I knew that they didn't care for me but you have to understand, too, that I would never take any guff from them or anything, I gave it right back when they did and so basically, they kind of stayed out of my way, but I certainly knew how they treated other employees, I knew what their work habits were, and I looked at a number of things over the years that I had know [sic] these too and that—when I put all these things together and decided who I was going to hire, that's why they did not fit in. And, I'm not talking just about the employees in talking, [sic] I'm talking about salesmen, and I'm talking about customers, I'm talking about supervisors, I'm talking about office people, I'm talking about—I looked at everything. I had to.

In late August Racicot told Robert Higgins, a former Swift employee who had resigned in 1976, that he had not hired Reetz and Hendrix because they had not shown the same loyalty towards "him and the company" as those he employed, and because Reetz had been a troublemaker in the past. Racicot considered both Reetz and Hendrix to be "hard workers" and Leslie, who supervised them for a substantial period of time, considered them to be "good employees" when they worked separately. In separate letters of recommendation which Leslie gave to Reetz and to Hendrix, Leslie characterized each of them as an "excellent worker."

Racicot credibly testified that the meats supply business is a highly competitive one and one in which customers service is most significant. Racicot further credi-

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pany. Hendrix's testimony on cross-examination to the effect that Racicot had never indicated to him by either words or action that he did not like him is as least facially inconsistent with Hendrix's testimony on direct examination to the effect that Racicot responded in a hostile manner to him during their telephone conversation and vowed to spare no cost in order to "get rid" of him. Moreover, Hendrix interposed denials as to his work attitude and stated unwillingness to work for Racicot at anticipated wage rates which are contradicted by the clear weight of the credible evidence. I conclude therefore that Hendrix is not an entirely credible witness.

[9] The foregoing is based upon the credited testimony of Richard Blomberg and Jerry Denny. I have also considered the testimony of Dean Meinzinger to the extent that it may bear upon these findings. Leslie Reetz was not interrogated concerning his participation in the loading of trucks driven by Denny.

[10] Both Leslie and Anderson credibly testified that Reetz and Hendrix had made statements to that effect in their presence. I do not credit the denials of Reetz and Hendrix.

bly testified that by reason of his direct, ongoing contacts with customers, the truckdriver in the performance of his delivery functions becomes an important "sales arm" of the company, and essential to the maintenance of good customer relations. Racicot further credibly testified that during the last 2 years of the Swift operation he was the direct recipient of complaints from customers concerning the attitude and appearance of Hendrix. From these complaints he formed the impression that Hendrix tended to compromise his service responsibilities in order to achieve an appearance of speed in the accomplishment of his delivery duties. Moreover, by reason of complaints received from customers concerning Hendrix's appearance, it became necessary for Racicot to issue a written directive to all drivers reiterating the policy of Swift that delivery personnel must wear white smocks and hats. Hendrix complied with the directive.

Racicot testified credibly with respect to three separate incidents involving delivery services performed by Hendrix which resulted in customer dissatisfaction and complaints. These incidents involved Zip's Drive-In, a customer in Glacier Park, and Casey's Restaurant. Reetz participated in the delivery at Casey's Restaurant. Each of the three incidents caused serious dissatisfaction on the part of the respective customers. The Casey's Restaurant delivery involved mitigating circumstances.

Racicot received a report to the effect that Reetz was not cooperative in agreeing to work overtime to meet exigencies. Personal considerations limited Reetz' availability for overtime work.

Leslie, his predecessor, Blomberg, and Anderson, each found Reetz and Hendrix recalcitrant but not disobedient to their direct orders.

(2) The alleged good-faith doubt

During the last 2 weeks of the Swift operation, Racicot received reports from Ocee White, Bill Dormady, and Jerry Anderson to the effect that they were seeking to obtain withdrawal cards from the Union. Later, in mid-August, he was informed by Dean Meinzinger that he had been unable to obtain a withdrawal card, although he had sought to do so. In substance, Racicot informed the employees both verbally and in writing that this was not a matter of his concern or responsibility and that they should seek advice from the National Labor Relations Board. Racicot had taken a withdrawal card from the Union in 1974, and he formed the opinion that by seeking to obtain withdrawal cards those employees were signifying that they did not wish to belong to a union. Racicot also knew that Raymond Hansen was not a member of the Union.

Conclusions

A. *The Successorship Issue*

The initial question to be resolved is whether Premium is the legal successor of Swift. I conclude that it is.

The Board has long held that a mere change in ownership of the employing business enterprise does not itself absolve the new owner from the obligation to recognize and bargain with the labor organization that represented the employees of the former owner. *Cruse Motors, Inc.*, 105 NLRB 242, 247 (1953); *Lincoln Private Police, Inc. as Successor to Industrial Security Guards, Inc.*, 189 NLRB 717, 719 (1971). Where there is a substantial continuity in the identity of the employing enterprise, the purchasing employer is bound to recognize and bargain with the incumbent union. See *Lincoln Private Police, Inc., supra*, and cases cited therein at footnote 6. In determining whether the "employing industry" remains substantially the same, the Board has applied such criteria as whether (1) there has been a substantial continuity of the same business operations; (2) the new employer uses the same plant; (3) the same or substantially the same work force is employed; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment, and methods of production are used; and (7) the same product is manufactured or the same service offered. See *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234, 236 (1972). In resolving the successorship issue, the Board has not accorded controlling weight to any single factor, but has evaluated all the circumstances present in any given case in arriving at the ultimate conclusion. See *Lincoln Private Police, Inc., supra*. Differences in the scope and character of the business operations of the new employer, as contracted to those of the predecessor enterprise, form part of the relevant circumstances, and must be weighed and given proper perspective in relation to other relevant factors. *G. T. & E. Data Services Corporation*, 194 NLRB 719, 721 (1972). However, in determining successorship, the keystone is whether there is substantial continuity of the employing industry. See *Saks & Company, d/b/a Saks Fifth Avenue*, 247 NLRB 1047 (1980), enfd. in part 634 F.2d 681 (2d Cir. 1980).

Respondent contends that it differs from the Swift operation both in nature and scope and was intended from its origin to have a fundamentally different type of business operation than did its predecessor, Swift. The evidence in this regard establishes that Robert Racicot, Respondent's president, organized the new corporated enterprise and achieved the financing necessary to render it viable, upon the concept that emphasis would be upon the customer service and not upon the retail fresh meats aspect of the meat purveying business; and a program of product development and promotion would augment the generic plan to the end that new customer relations, different from those extent under the Swift operation would emerge. Empirically, from the vantage point of 10 months of operating experiences, changes of significance in the product mix were wrought and new customer relationships were developed. Moreover, militating in favor of Respondent's view that it is not Swift's successor is the evidence establishing that Premium purchased nothing from Swift except its existing inventory, and undertook none of Swift's commercial obligations. However, I conclude that the differences which pertain in Respondent's operation were not of a character sufficient to change the "employing industry" or to render inappropriate the collective-bargaining unit in which the Union had been contractually recognized as the exclusive representative. Thus, Respondent, like Swift, commenced operations as a purveyor of meat, cheese, oils, and related

products; drawing its clientele exclusively from former customers of Swift situated in a geographic area, albeit minimally reduced, formerly served by Swift; and utilizing the same plant, processing equipment and job classifications as were used by Swift during the time that its operation was viable. Moreover, through the day-to-day involvement of Robert Racicot and of Jerry Anderson in plant operations, a significant carryover of managerial and supervisory authority from the Swift operation to that of Respondent was accomplished. Further, Respondent recruited its entire initial work complement from the production and maintenance unit of Swift's Spokane facility and utilized them in each of the job classifications represented in the former Swift unit. This "most important" consideration, when weighed in conjunction with the continuity factors detailed, strongly supports the finding here made that Respondent is a successor to Swift. See *Zim's Foodliner, Inc., d/b/a Zim's IGA Foodliner*, 201 NLRB 905, 909 (1973), enfd. 495 F.2d 1131 (7th Cir. 1974), cert. denied 419 U.S. 838; *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Saks & Company* v. *N.L.R.B.*, 634 F.2d 681 (1980). While managerial control over purchasing, product development, product mix, and employee relations has been localized under Respondent's operating scheme, and while both from planning and actual operating experience, product lines have been modified and significant changes have been wrought in the clientele served, these changes are not of such magnitude as to be controlling in a circumstance where, as here, the enterprise operates in the same industry, employing the same classification of employees in essentially unchanged working conditions. See *Zim's Foodliner, Inc., d/b/a Zim's IGA Foodliner, supra; Saks & Company, supra.* Cf. *Pacific Hide & Fur Depot, Inc.* v. *N.L.R.B.*, 553 F.2d 609, 611 (9th Cir. 1977), denying enforcement of 223 NLRB 1029 (1976).

B. *The Refusal To Hire Hendrix and Reetz*

It is well established that a successor employer is under no obligation to hire any or all of the employees of the former employer, but the selection process may not be influenced by discriminatory considerations proscribed by the Act. *Howard Johnson Company, Inc.* v. *Detroit Local Joint Executive Board, Hotel & Restaurant Employees Union, AFL-CIO*, 417 U.S. 249, 262, fn. 8 (1974); *N.L.R.B.* v. *Burns International Security Service, Inc.*, 406 U.S. 272, 280, fn. 5 (1972). It follows, therefore, that in selecting the employee complement for the new operation, Racicot was under no legal obligation to hire either Hendrix or Reetz, but was free under the statute to recruit employees from any source, including the Swift unit, so long as the selection process did not discriminate on the basis of union or protected concerted activity. Contrary to the General Counsel, I find that Respondent did not violate Section 8(a)(1) and (3) of the Act by its decision to exclude Hendrix and Reetz from the work force selected to staff the successor enterprise.

The record contains evidence from which an inference of discriminatory motivation may be inferred. This arises entirely from the role of Reetz as a union steward, and his vigorous efforts to enforce the terms of the collective-bargaining agreement; and from the apparent support accorded Reetz by Hendrix through a process of passive resistance, as it were, to the directive and instructive efforts of supervision. Augmenting this body of proof is the further evidence relating to the Hendrix grievance and the aftermath conversation between Hendrix and Racicot which portrays Racicot as resentful and distainful of Hendrix for grieving the issue of allegedly ignoring seniority in the reassignment of routes. But beyond this the General Counsel adduced no convincing evidence from which it could be concluded that Racicot was hostile to the grievance process *per se*, or that Reetz—or Reetz and Hendrix in tandum—had so aggressively pursued contractual or union interests as to develop in Racicot a rigidity or antipathy towards them or the Union. The grievances which Reetz did interpose were not numerous, and, except for the Hendrix grievance, were resolved in the initial phases without the direct involvement of Racicot. Reliance by the General Counsel upon Racicot's statement to Milsap, the Union's field representative, in late July to the effect that he was going to operate "nonunion" is misplaced for I conclude, in context both of circumstances which prevailed at the time of the statement, including the subsequent staffing of the new operation entirely with union members, that Racicot's statement referred not to membership considerations but to the then prevailing terms and conditions of employment defined in the collective-bargaining agreement between the Union and Swift.

Strongly countering the General Counsel's evidence is the defense interposed by Respondent which establishes to my satisfaction that Racicot would have excluded both Reetz and Hendrix from employment in the work force of the new enterprise even if there had been no involvement on their part in the grievance process or in the councils of the Union. A distillation of the evidence adduced by Respondent supports the finding, which I make, that Racicot's objection to both Reetz ahd Hendrix as employees was not to the legitimate involvement of either of them in seeking to enforce contractual terms, but to their arrogation of a status endowing them with the presumed right to challenge legitimate supervisory policy and directives and to respond only grudgingly to those which did not correspond to their perception of propriety. It was this attitudinal approach to their work, and the reported and verified instances of their failure to cooperate with unit and sales personnel, alike, which cemented Racicot's adverse opinion of Reetz and Hendrix as employees, an opinion which became more deeply engrained with respect to Hendrix, evolving from customer complaints regarding him. Only a simplistic, myopic view of the credited evidence would warrant the conclusion that Racicot's rejection of Reetz and Hendrix as employees likely to contribute to the success of his new, financially vulnerable enterprise was based in significant part upon their activist role in pressing the contract. The foundation of Racicot's objections to them as employees, and the considerations which, I find, would have caused him to exclude from his complement at the new enterprise even if, contrary to fact, they had not engaged in any protected concerted activity, was the irascibility which they shared and which they displayed towards

Racicot himself and supervision and the plant rank-and-file also. The record fully warrants the conclusion that, in matters having nothing to do with the enforcement of contractual terms, Racicot and supervision found Reetz and Hendrix, in tandum, recalcitrant. Moreover, the credited testimony of employees and salesmen who had worked with Reetz and Hendrix at the Swift plant supports the finding, which I make, that they were loath to cooperate in the accomplishment of work tasks and objectives, and this was a matter of common notoriety in the plant. Finally, I conclude and find that the sum total of the relation between Racicot, on the one hand, and Reetz and Hendrix, on the other, had led over the years to a conviction on Racicot's part that Reetz and Hendrix did not like him personally, and he felt similarly disposed toward them.

On the record as a whole, I conclude and find that in formulating the work unit at his new enterprise, Racicot selected personnel which he believed would work in harmony together to achieve efficiency and good customer relations, to the end that the likely success of the new venture would be enhanced and the threat of financial loss minimized. I further find that for reasons unrelated to their union or concerted activity, Racicot excluded Reetz and Hendrix because he felt they would hinder rather than contribute to these objectives. I find, therefore, that Respondent sustained its burden of showing that the exclusion of Reetz and Hendrix from the new employee unit was not based on impermissible, discriminatory considerations and would have occurred even if they had never engaged in union or concerted activities.

C. *The Bargaining Obligation*

Although I have found that Respondent is a successor employer to Swift, it does not follow that Respondent was precluded from establishing different conditions of employment for the new complement. See *Spruce Up Corporation*, 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975). In *Burns* the Supreme Court carved an exception to the general rule that a successor employer is ordinarily free to initially set the terms and conditions of employment under which it will hire its predecessor's employees, stating:

> [T]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

The General Counsel contends that, at the outset of its operations, Respondent employed a majority of the Swift's employees, and did so without *clearly announcing the wages and terms and conditions of employment* under which they would be employed. It is the General Counsel's contention that Respondent thereby forfeited "the opportunity to fix initial terms and conditions of employment" when it commenced operations on August 4. On the other hand, Respondent contends, in effect, that the presence of a bargaining obligation turns on whether, or at what point in time, a full complement of employees had been achieved, and, if so, whether former unit employees comprised a majority thereof.[11]

In the decision in *Spruce Up Corporation, supra*, the Board majority stated:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him—a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.
>
> We concede that the precise meaning and application of the Court's caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purpose of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish—nor do we believe the Court wished—to discourage continuity in employment relationships for such legalistic and artificial considerations. *We believe the caveat in "Burns," therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.* [Emphasis supplied.]

The comments of the Court majority in *Saks & Company*, 634 F.2d 681, 687 (2d Cir. 1980), is deemed pertinent in the precise circumstances of this case. In addressing the *Burns* "perfectly clear" exception the Court noted:

[11] For present analytical purposes, unit membership and not formal union affiliation or designation is controlling.

> Under that exception, as developed by the National Labor Relations Board, a successor employer is required to bargain with respect to initial terms only if it is perfectly clear that it plans to retain all the employees in the predecessor unit and hires those employees in a manner which leads them to believe that they will be hired on the terms and conditions that existed under the predecessor employer.

It is apparent from the instant record that, with the advent of the June 30 closure announcement, employees of Swift looked to Racicot as the source of future employment. No explicit proffers of employment were made in the aftermath of the closure announcement, however, it became clear to the employees at a point in time prior to August 4, that if Racicot were successful in organizing a new venture, the initial complement would be selected from among the Swift employee group. This arose from the feelers and tentative inquiries initiated by Racicot, and the grapevine interchange that undoubtedly functioned between the members of the small, tightly knit Swift employee group holding natural concern over future employment prospects. The record contains no proof that in the course of his conditional discussions with members of the Swift complement Racicot conditioned ultimate hire in the enterprise he was undertaking to organize upon abdication of union allegiance, although Racicot had forthrightly informed Union Representative Millsap that he would not operate the new entity which was in the planning stage on union terms and conditions of employment. The commonly accepted notion among Swift employees prior to August 4 that prevailing terms and conditions of employment would not survive in the new operation has origin both in the clear implication to be drawn from Racicot's conversations with the employees prior to August 4 indicating that wage rates other than those mandated by Swift's contract would prevail, and by employee acceptance of the economic reality that the new enterprise was an untested one in a highly competitive field in which the former employer, Swift, had not prospered. While it cannot be said that in specifically declaring his intention prior to August 4 to form a nucleus employee group from former employees of Swift, Racicot *explicitly* offered employment "only on different terms," neither may it be found that he misled employees into believing they would be retained "without change in their terms and conditions of employment." Cf. *Spruce Up Corporation, supra*. The precise terms were not fully defined, but the clear inference is that every employee affected possessed certitude that they would be on an altered footing. Thus, while the formulation of the initial complement was intended by Racicot to be from a majority of the Swift employees, his intentions were from the outset tied to different rates and benefits from those prevailing, and the employees fully comprehended this. I specifically conclude, therefore, that as Respondent neither actively nor tacitly misled the employees he was seeking to recruit into believing they would be retained without changes in their wages, hours, or conditions of employment, and where whose employees were fully aware of the intention of the new employer to establish a new set of conditions, there was no failure of communication, expression of intent, or clear announcement within the meaning of *Spruce Up* as to lead to a forfeiture of the *Burns* right to unilaterally set initial terms. When these considerations which attended the emergence of Respondent's operation are evaluated in context of the full thrust of the record evidence establishing that Racicot intended the initial work force to serve only as a transitional nucleus group to be augmented by employees recruited from random sources, I find that on August 4 and in the days that immediately followed a full complement of employees had not been achieved and the date of attainment not susceptible of accurate projection. Accordingly, I further find that Respondent was free to set the initial terms of employment on which he would hire employees. See *Pacific Hide & Fur Depot, Inc.* v. *N.L.R.B.*, 553 F.2d 609 (9th Cir. 1977). Cf., e.g., *Spitzer Akron, Inc.*, 219 NLRB 20 (1975), enfd. 540 F.2d 841 (6th Cir. 1976); *Stewart Granite Enterprises*, 255 NLRB 569 (1981); *L.A.X. Medical Clinic, Inc., et al.*, 248 NLRB 861 (1980).

D. *The Full Complement Issue*

However, the inquiry does not end here. Concluding, as I do, that the Union made an efficacious bargaining demand upon Respondent by and through the auspices of the Union's August 26 letter, which demand was, in legal effect, a continuing one, reenforced by the Union's subsequent letter of September 18, it becomes necessary to determine whether Respondent has achieved a full complement of employees so as to give rise to an 8(d) bargaining obligation and, if so, when the full complement was achieved. This determination is made necessary because, as found, the facts of record fully establish that the initial, nucleus group of employees was not intended as the full work force necessary to sustain projected operations.

Respondent contends that *Pacific Hide & Fur Depot, Inc.* v. *N.L.R.B.*, 553 F.2d 609 (9th Cir. 1977), denying enforcement of 223 NLRB 1029 (1976), is instructive and the rationale of the court fully applicable at the case at bar. The factual similarity between the two cases is striking and the analysis of the court compelling. Thus, the court stated:

> The *Burns* ["full complement" language] implies that when a new employer hires only part of the old unit, together with others who were never part of the unit, any decision regarding the employer's duty to bargain with the Union affects the new employer, the old employees whom he has hired, and the new employees who were not previously represented by the Union. The rights of all three must be considered. Basic to this consideration in Section 9(a) of the Act, 29 U.S.C. Section 129(a) which places in the hands of the majority of the employees in the unit the decision whether to be represented or not by the Union. That majority's right is paramount. The "full complement" standard of *Burns* attempts to define *when* the makeup of the controlling majority is to be determined.
>
> The problem then becomes one of defining what is meant by a "full complement." That cannot be

> done by the application of a mathematical formula but only by considering the facts of each case in light of the general goal which is sought—to assure majority rule within the new employer's unit as to whether and if so with what union there must be collective bargaining.

In *Pacific Hide*, as here, the employer embarked upon his new enterprises without full knowledge of how many employees he would need or how long it would take to have a full work force. There, as in the case at bar, the original nucleus group was comprised entirely of employees of the predecessor employer and this work force was soon enlarged to include employees recruited from sources other than the predecessor's work force. Similarly, in *Pacific Hide*, as here, the predecessor's employees constituted a majority both at the time the union demanded recognition and on the date the successor employer refused to bargain on the grounds that a full complement had not been achieved. In *Pacific Hide* the full complement was achieved within 60 days. Respondent contends, in effect, that its expanding operation achieved the stability sufficient to support a "full complement" determination only after the enterprise had been in existence for 10 months and management's plans for restructuring the product line and expanding and solidifying its clientele had been tested. In discussing and applying the *Pacific Hide* rationale, the court in *N.L.R.B.* v. *Pre-Engineered Building Products, Inc.*, 603 F.2d 134 (10th Cir. 1979), stated:

> The process of identifying a full complement thus involves balancing the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible. It would be ludicrous to postpone defining a full complement until the successor of a small enterprise had achieved a status of a multi-billion dollar international corporation. But it could also be inappropriate to precipitately point to a full complement as existing at the moment a successor assumes operation of an essentially moribund predecessor.

The rebuilding task which faced the successor employer in *Pre-Engineered Building Products, Inc.*, was different in degree from that confronting Respondent here, but the need to "rebuild both production demand and work force" which the court there found significant requires cognizance here. The task is one of "balancing the objective of selection of a bargaining representative by the maximum number of employees with the objective of employee representation as soon as possible." *N.L.R.B.* v. *Hudson River Aggregates*, 639 F.2d 865 (2d Cir. 1981), enfg. 246 NLRB 192 (1979). If Swift was not a moribund business at the time of closure, neither did Respondent succeed to "an on-going business, continuing its operations essentially unchanged," as was the case in *Hudson River*. Factual particularities dictate whether an employer may delay its bargaining obligation until it has expanded its business to the proportions contemplated when it purchased the enterprise. *Id.* at 870. But in a circumstance, as here, wherein the employing industry remains the same, and the collective-bargaining unit appropriate by reason of the carryover from the predecessor employer to the new employer of the same job classifications and similar job functions, the bargaining rights and the interest of the former unit members now employed by the new employer, newly hired employees and the new employer are best accommodated and balanced by determing the majority status of the union as of the date the new employer began full-scale operations with a representative complement, even though the hoped for expansion of clientele, revenue, and operating personnel had not been fully achieved. See *Hudson River Aggregates, Inc.*, 246 NLRB 192 (1979). The record establishes that in the 3-week period between August 4 and 26 there were four acquisitions to the operating unit, offset by the termination of one of the newly acquired employees and the resignation of Dormady, a Swift employee who worked for 3 days with Respondent. On August 26 the operating unit was comprised of eight rank-and-file employees, including five former employees of Swift. Anderson, who had worked for Swift, and who was employed by Respondent in a supervisory capacity, but with production duties, also comprised Respondent's work force on August 26. The numerical size of the operating unit remained unchanged for the next 5 months. From this it must be concluded that on August 26 Respondent's operation was no longer a transitional one, but had evolved into a full-scale mode with the work force comprised of a representative complement. Nor did subsequent eventualities, which included the launching of a new food service item in January, the resultant hire of one full-time and two part-time employees, and the achievement after less than 10 months of operating experience of an expanded complement of 13 employees, serve to so change the nature of the operation or the size of the complement as to invalidate the use of the full-scale operations/representative complement criterion for fixing the date for determining the Union's majority status. See *Pre-Engineered Building Products, Inc.*, 228 NLRB 841, fn. 1 (1977).

I conclude and find that former production and maintenance employees of Swift comprised a majority of the production and maintenance unit at Respondent's Spokane plant when the Union made its August 26 demand for recognition and bargaining. I further find that, absent a valid defense, Respondent had an obligation on and after August 26 to recognize and bargain with the Union. In this connection, Respondent contends that it entertained a reasonably based good-faith doubt as to the Union's continued majority when evaluated against the objective considerations' test defined by the Board. E.g., *Terrell Machine Company*, 173 NLRB 1480, 1481 (1969). See also *Triplett Corporation*, 234 NLRB 985 (1978). Respondent's reliance upon information that some of the new employees recruited from the Swift unit (White and Meinzinger, as well as Dormady, who had resigned, and Anderson, a supervisor) had sought to obtain withdrawal cards from the Union is clearly deficient as a basis for sustaining the defense of a reasonably based good-faith doubt. See *Triplett Corporation, supra*. Indeed, Racicot's assumption that in seeking to obtain withdrawal cards

the employees were, in effect, expressing a desire no longer to be represented collectively by the Union as a bargaining agent is itself an exercise in subjective interpretation. This is so, because on the basis of Racicot's own credited testimony, he refrained from engaging in any conversation or other conduct designed to determine whether this action by a segment of the employee group signaled a desire on their part not to be represented in collective bargaining by the Union, and he was privy to no reliable information reflecting a disinterest on the part of the employee complement as a whole in further representation by the Union. The Board has frequently held that a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union. E.g., *Orion Corporation*, 210 NLRB 633 (1974). Racicot knew on August 26 when the Union made its bargaining demand that the majority of the present employee group had been employed in the unit represented by the Union, and he thus had basis for assuming that the Union had at least colorably claim to recognitional entitlement irrespective of any other legal challenge which Respondent might interpose on the basis of *Burns*. I find that the evidence does not support Respondent's defense of a reasonably based good-faith doubt as to the Union's majority status on August 26. See *Glenn Spooner d/b/a D & F Super Market*, 208 NLRB 891 (1974). Cf. *Stresskin Products Co., Division of Tool Research*, 197 NLRB 1175, 1178 (1972); *The Freeman Company*, 194 NLRB 595, 598 (1971). As a majority or Respondent's operating employees on August 26 were former employees of Swift represented by the Union who had paid dues to the Union in its capacity as their exclusive collective-bargaining representative, I find that, in its capacity as a legal successor to Swift and as an employer of a full complement, Respondent had the duty pursuant to the Union's August 26 demand to recognize and bargain with the Union as the exclusive representative of that work complement. As Respondent has refused to accord recognition to the Union and to engage in collective bargaining, I find that Respondent has violated Section 8(a)(5) of the Act.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Premium Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Food & Commercial Workers Local Union No. 1439, affiliated with United Food & Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following described unit is a unit appropriate for the purposes of collective bargaining:

> All production and maintenance employees, including truckdrivers at Respondent's Spokane, Washington, plant, excluding manager, salesmen, clerical employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act.

4. At all times on and after August 26, 1980, the Union has been the exclusive collective-bargaining representative of the employees in the unit described above.
5. Respondent is a successor of Swift Fresh Meat Company and as of August 26, 1980, had employed a full complement of production and maintenance employees to operate its Spokane, Washington, plant.
6. On August 26, 1980, the Union made a valid demand for recognition and bargaining, which demand Respondent refused, and continues to refuse.
7. By failing and refusing on and after August 26, 1980, to recognize and bargain with the Union as the representative of the employees in the unit described above, Respondent violated Section 8(a)(5) and (1) of the Act.
8. Except to the extent specifically found herein, Respondent engaged in no other conduct in violation of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after August 26, I shall recommend that it be ordered to recognize and bargain with the Union upon request.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The Respondent, Premium Foods, Inc., Spokane, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with United Food & Commercial Workers Local Union No. 1439, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the exclusive collective-bargaining representative of employees described below:

> All production and maintenance employees, including truckdrivers at Respondent's Spokane, Washington, plant, excluding manager, salesmen, clerical employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Food & Commercial Workers Local Union No. 1439, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the exclusive representative of all employees in the unit described above, and if an understanding is reached, embody it in a signed agreement.

(b) Post at its plant in Spokane, Washington, copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."